

control" of the element). In fact, the Commission's detailed description of the nature of the purchasing process makes clear that no form of physical control is contemplated, and that any claimed threat to intellectual property is likely highly contrived:

A competing provider will purchase and obtain the local switching element the same way it obtains an unbundled local loop, that is, by ordering, via electronic interfaces, the local switching element and particular vertical switching features. The incumbent LEC will receive the order and activate (or deactivate) the particular features on the customer line designated by the competing provider. Consequently, the incumbent LEC is not required to relinquish control over operations of the switch.

First Report and Order, ¶ 415.²²

Moreover, numerous LECs, including those that now raise these intellectual property claims, have for years similarly provided interexchange carriers and independent LECs with dedicated facilities and unbundled access to network capabilities that provide the same degree of control as access to network elements, without raising any claim that such provision violated any party's intellectual property rights. Nor, to AT&T's knowledge, did any vendor raise objections in relation to the provision of those facilities and their functionalities.

Specifically, although the existence of a federal duty to provide access to competing carriers for the provision of local exchange services is new, the LECs' provision of access to elements

²² See also id., ¶ 258 (carriers seeking shared facilities "are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis"); id., ¶ 412 ("[a] requesting carrier will deploy individual vertical features on its customers' lines by designating, via an electronic ordering interface, which features the incumbent LEC is to activate for particular customer lines"); id., ¶ 414 (same).

of their network, on a stand-alone basis and with the same extent of control and manipulation that new entrants will enjoy under the 1996 Act, is not. Even prior to the passage of the Act, and in some cases in anticipation of the Act's future duties, LECs provided, or had announced plans to provide, access to less robust versions of virtually all of the elements required to be provided under the First Report and Order. In particular, although such access did not comply with the nondiscrimination, pricing, and other requirements of the 1996 Act, LECs had provided or committed to provide access to the functionalities of each of the following facilities of their network, with the same degree of control as CLECs would obtain under section 251: (1) loops; (2) switching; (3) databases; (4) signalling; (5) dedicated transport facilities; (6) digital cross-connection; and (7) Service Management Systems (SMS) and Service Creation Environments (SCE) for purposes of AIN development. Although the ILECs are now likely to claim that these prior instances were "services" rather than "elements," the fact is that in each instance carriers obtained the functionalities of a discrete and identifiable facility or equipment.

(1) Loops. Even before passage of the Act, a number of LECs had provided unbundled loops pursuant to state orders. See Interconnection Order, ¶ 379. For instance, in Illinois Ameritech had offered (and CLECs had purchased) both analog and digital loops, defined by Ameritech as "a transmission path between the network interface (NI) located at the customer's premises and the vertical side of the main distribution frame." Ameritech Tariff Ill. C.C. No. 5, § 26.1.2.A (issued May 22, 1995). This definition

is substantially identical to the unbundled loop described in the First Report and Order (§ 380). Similarly, NYNEX has sold unbundled "links" to CLECs since at least the early 1990s. See NYNEX Tariff (NY) PSC No. 900, § 26 (issued June 5, 1992). In both instances, while the ILECs' provision of access was less robust than is now required by the Commission's rules, CLECs obtained the same degree of control as contemplated by the Commission's implementing regulations.

(2) Switching. Both NYNEX and Ameritech have provided switching "ports" to competitors on an unbundled basis under state tariffs even before passage of the 1996 Act. Although those "ports" did not include all of the vertical features that are part of the unbundled switch (and were priced well above cost), purchasers of the "ports" also obtained the capability of adding vertical features for additional charges. Thus, by purchasing the "port" as well as any additional vertical features the LECs had separately priced, CLECs could (and did) obtain all of the technical functionalities of, and the same apparent degree of control (including remote manipulation) over, the unbundled switch. See, e.g., Ameritech Tariff Ill. C.C. No. 5, § 26.1.2.B. (issued May 22, 1995); NYNEX Tariff (NY) PSC No. 900, § 25 (issued June 5, 1992).

Neither NYNEX nor Ameritech (nor, to AT&T's knowledge, any of their vendors) ever raised any intellectual property concerns with providing access to those switching capabilities. Indeed, in a letter accompanying one of its tariff filings, Ameritech informed the Illinois Commerce Commission that "Nortel

had reviewed" the "product with regard to its technical feasibility" and had "report[ed]" that Ameritech's offering could "be implemented on the DMS-100 switch product with currently generally available switch generics." Ameritech Advice No. 5432 (Illinois Commerce Commission, Aug. 1, 1996). Had provision of access to the switch threatened any of Nortel's intellectual property rights, Nortel surely would have raised such concerns with Ameritech at that time.

(3) Databases. As the Commission observed in the First Report and Order (§ 490), "many separate carriers access incumbent LEC Toll Free Calling and LIDB databases for the proper routing and billing of calls." § 490. AT&T operators, for example, routinely dip into LEC LIDB databases to determine whether a called party accepts collect and bill-to-third-party calls. Access to the LIDB and Toll Free Calling databases is tariffed on a stand-alone per-query basis in numerous LECs' access tariffs, and includes all of the functionalities, and the same apparent degree of control, that would be obtained by carriers purchasing those databases as unbundled elements. See, e.g., SBC F.C.C. Tariff No. 73, § 24, NYNEX F.C.C. Tariff No. 1, § 21.

(4) Signalling. The First Report and Order requires LECs to provide access to their signalling systems on an unbundled basis. See First Report and Order, §§ 479-483. In that proceeding, "most BOCs state[d] that they already provide access to their signalling systems." Id. § 460. AT&T interconnects with the LECs today (primarily STP to STP) to exchange SS7 out-of-band signalling to process 800- and other long distance calls. AT&T

compensates LECs for the exchange of such signals on a stand-alone basis pursuant to numerous access tariffs. The functionalities and the optional points of interconnection offered for such signalling under existing tariffs appear to be no different from those provided under the Commission's order for purposes of providing local exchange services. See, e.g., SBC F.C.C. Tariff No. 73, § 23.

(5) Dedicated Transport Facilities. All LECs today provide access to dedicated facilities between LEC end offices and between such end offices and interexchange carrier points of presence for the origination and completion of interLATA calls. See, e.g., SBC F.C.C. Tariff No. 73, § 7; U S West F.C.C. Tariff No. 5, § 7; NYNEX F.C.C. Tariff No. 1, § 7; Bell Atlantic F.C.C. Tariff No. 1, § 7. The control interexchange carriers obtain to those facilities today are no different from those that would be obtained by CLECs for the transport of local exchange calls under section 251(c).

(6) Digital Cross-Connection. The "BOCs, GTE and other large LECs currently make [digital cross connect system] capabilities available for the termination of interexchange traffic." See First Report and Order, ¶ 444. DCS functionality allows carriers such as AT&T to aggregate and disaggregate high-speed traffic and is used, for example, to remotely reconfigure channels on a dedicated facility obtained from a LEC. AT&T purchases digital cross-connection from the LECs today as an option in conjunction with dedicated transport under LEC access tariffs, and obtains the same access in terms of functionality and control

as it would obtain purchasing digital cross-connection as an unbundled element under § 251. See, e.g., Bell Atlantic F.C.C. Tariff No. 1, § 7.2.12; Bell South F.C.C. Tariff No. 1, § 7.4.12.

(7) Access to LEC SMSs and SCEs for AIN Development. At the time of the First Report and Order, "BellSouth was prepared to tariff and offer" to other carriers "nondiscriminatory access to the SMS and SCE for the creation and deployment of AIN services." See First Report and Order, ¶ 496. In particular, BellSouth touted that its planned offering would permit "third party service providers' access to BellSouth's SMS capabilities" and SCE environment in order to "allow third party service providers to create" their own AIN "services to be executed on BellSouth's service platform." See BellSouth Petition for Expedited Waiver of Part 69 Rules (filed Dec. 8, 1995); FCC Notice Establishing Pleading Cycle, DA 96-27 (Jan. 17, 1996). Although further behind in their implementation, both Bell Atlantic and Ameritech had, prior to passage of the Act, announced plans "to allow third parties themselves to create AIN services at a terminal [] in [the BOC's] office." See First Report and Order, ¶ 496 & n. 1153. These plans would apparently have provided CLECs with the same degree of access and control to the LECs' SMSs and SCEs as the Commission required, yet none of these BOCs suggested that such access would have violated any vendor's intellectual property rights.²³

²³ In its brief to the Eighth Circuit, AT&T stated that a CLEC "might" obtain access to a third party's intellectual property under the Commission's AIN rules. See Joint Brief of AT&T et al. (continued...)

* * *

There is no relevant difference between the control CLECs now seek over these network elements under Section 251(c)(3) and the functionalities and control which interexchange and other carriers obtained in the past. In each of the above instances, carriers obtained the functionalities and capabilities of the incumbent LECs' discrete and identifiable network elements on a stand-alone basis and exercised no less control over those elements than the control they will now have for the provision of local services. Under the First Report and Order (§ 258), the incumbent LECs will continue to be responsible for maintaining and provisioning these elements, just as they have been in the past.²⁴

It is only now that carriers are seeking to exercise their statutory rights to purchase access to network elements in order to compete with the LECs that those LECs have raised the specter of vague "intellectual property rights" of third-party vendors as grounds for refusing to comply with their access obligations. The LECs' true objection appears to be to the purpose for which access is being sought and not to the fact of access

²³ (...continued)
in Support of the FCC, p. 92, Iowa Utilities Bd. v. FCC, 96-3321 (8th Cir., filed Dec. 23, 1996). In light of these three RBOCs' actual announced plans to offer precisely the same access to CLECs prior to the 1996 Act, it appears that even that tentative suggestion was unwarranted.

²⁴ That is presumably why the most SBC could say in a recent carefully worded pleading was that its "agreements [with vendors] do not expressly authorize Southwestern Bell to give or provide access to the intellectual property to other telephone companies." See SWBT Br., pp. 4-5 (emphasis added). Of course, express authorization of that sort would be both remarkable and unnecessary.

itself. If the LECs (or their vendors) truly had valid intellectual property objections to the provision of access to network elements, those concerns would have been raised years ago.

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